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No. 01-442

Supreme Court, U.S.
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In The

Supreme Court of the United States

CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS,

Petitioners,

v.

THE DOW CHEMICAL COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE NAIC[1]

The National Association of Insurance Commissioners (NAIC) is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Started in 1871, it is the nation's oldest association of state government officials. The members of the NAIC completely control the same.

In submitting this brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the mission of the NAIC, as set out in its Annual Report, to:

> . . . assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:
>
> 1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
>
> 2. Promote the reliability, solvency, and financial solidity of insurance institutions; and

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[1] Neither counsel for the parties to this matter authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this *amicus curiae* brief. Stipulations indicating their consent have been filed with the Clerk of the Court.

3. Support and improve state regulation of insurance.

The members of the NAIC believe that the decision of the Texas Court of Appeals is in direct conflict with the procurement tax systems in place in the forty-four states that have enacted the NAIC Nonadmitted Insurance Model Act and its implementing regulation, the NAIC Allocation of Surplus Lines and Independently Procured Insurance Premium Tax on Multi-State Risks Model Regulation, or similar legislation and regulations. The original NAIC *Unauthorized Insurers Model Act* was adopted by the NAIC in 1969. While renamed and amended, it has been a continuous model act of the NAIC since that date. The Texas Court of Appeals has now held, thirty-two years later, that the Texas laws incorporating the NAIC model act and regulation are in conflict with the McCarran-Ferguson Act and are therefore unenforceable. The members of the NAIC, including the Texas Commissioner of Insurance, strongly disagree.

The NAIC is concerned that, if the Texas decision is allowed to stand, purchasers of insurance will have a strong financial incentive to purchase nonadmitted insurance from foreign and alien insurers, creating a loss in premium tax revenue to the state in which the subject of the risk insured against is located.

The NAIC asks that this Honorable Court grant the Petition for Writ of Certiorari. The members of the NAIC believe that a review of the decision of the Texas Court of Appeals is in the best interest of insurance consumers, to whom all insurance commissioners, superintendents and directors (all of whom are members of and control the

NAIC) are charged by both State and Federal law to protect.

SUMMARY OF ARGUMENT

The members of the National Association of Insurance Commissioners believe that the plain language of the McCarran-Ferguson Act allows states to tax insurance transactions in any way permitted by the Due Process Clause of the United States Constitution. The Texas Court of Appeals has held otherwise.

The inability of a state to allocate and assess procurement tax liability when an insurance risk is located partially or entirely in the state will result in inequities in the taxing system. Most states assess a procurement tax authorized by legislation based on the NAIC model and have thus created a multi-state system of equitable tax allocation. States that protect an insurance risk by providing services that reduce the risk will be deprived of the taxes on the insurance transaction simply because the insurance contract was signed in another state or country. Insurance consumers are encouraged to purchase nonadmitted insurance in those jurisdictions with the lowest tax rate. Those jurisdictions may not allocate the tax liability. The members of the NAIC do not believe this result is required under the McCarran-Ferguson Act or desirable.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE TEXAS COURT OF APPEALS HAS INTERPRETED THE MCCARRAN-FERGUSON ACT IN A WAY THAT CONFLICTS WITH THE DECISIONS OF THIS COURT AND SEVERAL STATE COURTS OF LAST RESORT AND TEXAS WILL BE COMPELLED TO ADMINISTER ITS INDEPENDENTLY PROCURED INSURANCE PREMIUM TAX IN A WAY THAT WILL CONFLICT WITH THE TAXING METHODS OF FORTY-THREE STATES.

This Court has stated that the plain language of the McCarran-Ferguson Act shall control its meaning. The Act itself states:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

15 U.S.C. § 1011. In response to the argument that the Act restricts the regulation of insurance by the states to what the tax laws were at the time of its passage, this Court stated:

> More importantly, petitioner's interpretation of the statute is at odds with its plain language. The McCarran-Ferguson Act did not simply overrule *South-Eastern Underwriters* and restore the status quo. To the contrary, it transformed the legal landscape by overturning the normal rules of pre-emption. . . . it is impossible to compare our present world to the one that existed at a time when the business of insurance

> was believed to be beyond the reach of Congress' power under the Commerce Clause.

United States v. Fabe, 508 U.S. 491, 507-508 (1993).

Yet, the Texas Court of Appeals has imposed such a barrier and it restricts the ability of Texas to impose a tax upon the business of insurance in a manner that is entirely proper under the Due Process Clause of the U.S. Constitution, despite the plain language of the McCarran-Ferguson Act.

The allocation method of assessing the particular tax at issue in this cause, a tax imposed upon the premiums paid for independently procured insurance policies, is in use by a significant majority of states and is considered fair and equitable. Section 6 of the NAIC Nonadmitted Insurance Model Act sets out the mechanics of this tax, which reflects that "the tax payable shall be computed on the portion of the premium properly attributable to the properties, risks or exposures located or to be performed in this state. . . . " Sec. 6 C., Nonadmitted Insurance Model Act, NAIC, *Model Laws, Regulations and Guidelines*, Vol. V, p. 870 (1999). The NAIC has also adopted a model regulation that sets forth formulas, categories of risks and reporting forms for implementing this tax. Allocation of Surplus Lines and Independently Procured Insurance Premium Tax on Multi-State Risks Model Regulation, NAIC, *Model Laws, Regulations and Guidelines*, Vol. V, p. 872 (1995). As reported in the *Compilation of Minutes* of the 2001 Summer National Meeting of the NAIC[2], set out

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[2] The *Compilation of Minutes* will be published as the *2001 Proceedings of the NAIC, 2nd Quarter.*

in the Appendix to this brief, this method of taxation is in use by the great majority of states.

Deprived of its ability to assess a justifiable tax upon out-of-state insurance purchases using the fair and equitable allocation method, Texas will likely have no choice but to make up for the shortfall in tax revenue by assessing full tax liability upon those insurance purchases occurring within its borders that protect risks which are in whole or in part not located within its borders. This may cause insureds to incur a greater tax burden, deprive other states of tax revenue that they would otherwise receive and motivate sophisticated insureds to conduct insurance transactions offshore. The members of the NAIC do not believe any of these outcomes are desirable. Other states may in return take similar actions to protect their tax revenue, thus abandoning the system envisioned by the members of the NAIC when they adopted the Nonadmitted Insurance Model Act and its predecessor model acts.

Many state courts of last resort have long ago held that the Due Process Clause is not offended when a state assesses taxes on out-of-state insurance transactions. *E.g.*, *Ministers Life and Casualty Union v. Haase*, 141 N.W.2d 287 (Wis. 1966); *Howell v. Rosecliff Realty Co.*, 245 A.2d 318 (N.J. 1968). In *Howell*, the New Jersey Supreme Court set out why this issue is of importance to the NAIC members:

> The insurance industry is highly regulated to the end that insurance will be written fairly and by companies that are financially sound. When coverage cannot be obtained from fully authorized carriers at filed rates, the insurance, then

> called 'surplus,' may be placed elsewhere. . . . Insurance is so essential a part of the area of a State's primary responsibility that the State's power should not depend upon where the parties choose to contract for the insurance or to pay the loss. The State's interest and its responsibility to its citizens should be enough to support regulation and taxation of policies relating to the risks within its jurisdiction.

Howell, 245 A.2d at 316, 324. This Court has previously ruled that the Commerce Clause is not offended by such a tax. "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act. . . . The unequivocal language of the Act suggests no exceptions." *Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 653 (1981). This Court also noted that the limits of the Due Process Clause were not expanded or contracted by the McCarran-Ferguson Act:

> We reject appellee's argument that the McCarran-Ferguson Act altered constitutional standards other than those derived from the Commerce Clause. The House Report states: . . . your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court. . . . "

Id. at 656, n. 6. Thus, *amicus curiae* believes that this Court's current controlling decisions on the limits of the Due Process Clause must be utilized to determine if the Texas independently procured insurance tax is allowable,

not the long surpassed decisions of this Court handed down in 1897, 1922 and 1938.[3]

CONCLUSION

The members of the National Association of Insurance Commissioners believe that the McCarran-Ferguson Act grants them wide flexibility in the regulation and taxation of the business of insurance, within the limits of the Due Process Clause as set out in the current decisions of this Honorable Court. The members believe that any restriction in this flexibility is not consistent with federal law and this Court's jurisprudence and, ultimately, will harm insurance consumers, whom the members of the NAIC are charged by both State and Federal law to protect.

Respectfully submitted,

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[3] *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922); *Connecticut Gen. Life Ins. Co. v. Arkansas*, 303 U.S. 77 (1938).

APPENDIX

NONADMITTED INSURANCE MODEL ACT

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Section 1. Short Title

This Act shall be known and may be cited as "The Nonadmitted Insurance Act."

Section 2. Purpose – Necessity for Regulation

This Act shall be liberally construed and applied to promote its underlying purposes which include:

A. Protecting persons seeking insurance in this state;

B. Permitting surplus lines insurance to be placed with reputable and financially sound nonadmitted insurers and exported from this state pursuant to this Act;

C. Establishing a system of regulation which will permit orderly access to surplus lines insurance in this state and encourage admitted insurers to provide new and innovative types of insurance available to consumers in this state;

D. Providing a system through which persons may purchase insurance other than surplus lines insurance, from nonadmitted insurers pursuant to this Act;

E. Protecting revenues of this state; and

F. Providing a system pursuant to this Act which subjects nonadmitted insurance activities in this state to the jurisdiction of the insurance commissioner and state and federal courts in suits by or on behalf of the state.

Section 3. Definitions

As used in this Act:

A. "Admitted insurer" means an insurer licensed to do an insurance business in this state.

B. "Capital," as used in the financial requirements of Section 5, means funds paid in for stock or other evidence of ownership.

C. "Commissioner" means the insurance commissioner of [insert name of state] , or the commissioner's deputies or staff, or the Commissioner,

Director or Superintendent of Insurance in any other state.

Drafting Note: Insert the title of the chief insurance regulatory official wherever the term "commissioner" appears.

D. "Eligible surplus lines insurer" means a nonadmitted insurer with which a surplus lines licensee may place surplus lines insurance pursuant to Section 5 of this Act.

E. "Export" means to place surplus lines insurance with a nonadmitted insurer.

F. "Foreign decree" means any decree or order in equity of a court located in any United States jurisdiction, including a federal court of the United States, against any person engaging in the transaction of insurance in this state.

G. "Insurer" means any person, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, insurance exchange syndicate, fraternal benefit society, and any other legal entity engaged in the business of insurance.

H. "Kind of insurance" means one of the types of insurance required to be reported in the annual statement which must be filed with the commissioner by admitted insurers.

I. "Nonadmitted insurer" means an insurer not licensed to do an insurance business in this state.

J. "Person" means any natural person or other entity, including, but not limited to, individuals, partnerships, associations, trusts or corporations.

K. "Policy" or "contract" means any contract of insurance, including but not limited to annuities, indemnity, medical or hospital service, workers' compensation, fidelity or suretyship.

L. "Reciprocal state" means a state that has enacted provisions substantially similar to:

(1) Sections 5F, 5I(5), 5Q(10), 5R(4) and Section 6; and

(2) The allocation schedule and reporting form contained in [cite the regulation on surplus lines taxation].

Editor's Note: This model regulation does not yet exist, but is in the process of development.

M. "Surplus," as used in the financial requirements of Section 5, means funds over and above liabilities and capital of the company for the protection of policyholders.

N. "Surplus lines insurance" means any property and casualty insurance in this state on properties, risks or exposures, located or to be performed in this state, permitted to be placed through a surplus lines licensee with a nonadmitted insurer eligible to accept such insurance, pursuant to Section 5 of this Act.

Drafting Note: If a state chooses to adopt the alternative Section 5B, this definition of "surplus lines insurance" should be consistent with the acceptable coverage listed in Section 5B. States may choose to extend the definition of "surplus lines insurance" beyond property/casualty insurance.

O. "Surplus lines licensee" means an individual, firm or corporation licensed under Section 5 of

this Act to place insurance on properties, risks or exposures located or to be performed in this state with nonadmitted insurers eligible to accept such insurance.

P. "Transaction of insurance"

(1) For purposes of this Act, any of the following acts in this state effected by mail or otherwise by a nonadmitted insurer or by any person acting with the actual or apparent authority of the insurer, on behalf of the insurer, is deemed to constitute the transaction of an insurance business in or from this state:

(a) The making of or proposing to make, as an insurer, an insurance contract;

(b) The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety;

(c) The taking or receiving of an application for insurance;

(d) The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration for insurance or any part thereof;

(e) The issuance or delivery in this state of contracts of insurance to residents of this state or to persons authorized to do business in this state;

(f) The solicitation, negotiation, procurement or effectuation of insurance or renewals thereof;

(g) The dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks, the fixing of rates or investigation or adjustment of claims or losses or the transaction of matters subsequent to effectuation of the contract and arising out of it, or any other manner of representing or assisting a person or insurer in the transaction of risks with respect to properties, risks or exposures located or to be performed in this state;

(h) The transaction of any kind of insurance business specifically recognized as transacting an insurance business within the meaning of the statutes relating to insurance;

(i) The offering of insurance or the transacting of insurance business; or

(j) Offering an agreement or contract which purports to alter, amend or void coverage of an insurance contract.

(2) The provisions of this subsection shall not operate to prohibit employees, officers, directors or partners of a commercial insured from acting in the capacity of an insurance manager or buyer in placing insurance on behalf of the employer, provided that the person's compensation is not based on buying insurance.

(3) The venue of an act committed by mail is at the point where the matter transmitted by mail is delivered or issued for delivery or takes effect.

Drafting Note: States may need to alter this subsection to reflect their decision as to whether they intend to permit citizens to directly purchase coverage within the state from a nonadmitted insurer, or if self-procurement of coverage will be permitted only when it occurs outside the state. States electing to allow direct procurement will need to insert an appropriate exemption in Section 4A of this Act. Additionally, states should consider whether the preceding definition of "transaction of insurance" is consistent with other statutory definitions of this phrase in the state. Finally, states may want to consider whether group insurance purchases or the maintenance of insurance books and records in this state should fall within the scope of the definition of "transaction of insurance."

Q. "Type of insurance" means coverage afforded under the particular policy that is being placed.

R. "Wet marine and transportation insurance" means:

(1) Insurance upon vessels, crafts, hulls and other interests in them or with relation to them;

(2) Insurance of marine builder's risks, marine war risks and contracts of marine protection and indemnity insurance;

(3) Insurance of freight and disbursements pertaining to a subject of insurance within the scope of this subsection; and

(4) Insurance of personal property and interests therein, in the course of exportation from or importation into any country, or in the course of transportation coastwise or on inland waters, including transportation by

land, water or air from point of origin to final destination, in connection with any and all risks or perils of navigation, transit or transportation, and while being prepared for and while awaiting shipment, and during any incidental delays, transshipment, or reshipment; provided, however, that insurance of personal property and interests therein shall not be considered wet marine and transportation insurance if the property has:

(a) Been transported solely by land; or

(b) Reached its final destination as specified in the bill of lading or other shipping document; or

(c) The insured no longer has an insurable interest in the property.

Comment: The language added in 1994 to the end of the definition of "wet marine and transportation insurance" {Subparagraphs 4(a), 4(b), AND 4(c)& is intended to clarify the scope of the definition, which ultimately affects the exemption of certain risks from this Act. The 1994 amendments address current regulatory concerns and concerns raised by those who drafted the 1983 amendments to the Model Surplus Lines Law. The 1983 drafters wrote: "Several [drafters] felt the term 'storage' should not appear in . . . [the wet marine definition] to ensure that warehousemen and other types of insurance covering risks of storage are not interpreted to be within the purview of this definition. The term 'delays' is sufficiently broad to cover temporary storage while in the course of transit."

Drafting Note: In addition to the definitions provided in this section, individual states may wish to consider adopting definitions for "agent," "broker" or "producer" in a manner consistent with its other laws. Additionally, states may want to cross-reference the definition of "insurance" as it appears elsewhere in the state insurance code. The definition of insurance should reach illegal unauthorized activities.

[. . .]

Section 6. Insurance Independently Procured – Duty to Report and Pay Tax

A. Each insured in this state who procures or continues or renews insurance with a nonadmitted insurer on properties, risks or exposures located or to be performed in whole or in part in this state, other than insurance procured through a surplus lines licensee, shall, within [insert number] days after the date the insurance was so procured, continued or renewed, file a written report with the commissioner, upon forms prescribed by the commissioner, showing the name and address of the insured or insureds, name and address of the insurer, the subject of the insurance, a general description of the coverage, the amount of premium currently charged, and additional pertinent information reasonably requested by the commissioner.

For the purposes of this subsection, properties, risks or exposures only partially located or to be performed in this state, which are covered under a multi-state policy placed by a surplus lines licensee in another state, shall be deemed to be

insurance independently procured unless the insurer is an admitted insurer.

Drafting Note: Subsection A may need to be revised in those states exempting from taxation insurance procured by nonprofit educational institutions and their employers, from nonprofit educational insurers.

B. Gross premiums charged for the insurance, less any return premiums, are subject to a tax at the rate of [insert number] percent. At the time of filing the report required in Subsection A of this section, the insured shall pay the tax to the commissioner, who shall transmit the same for distribution as provided in this Act.

Drafting Note: Existing state laws and procedures may require that the tax report be forwarded to another state agency, such as the Department of the Treasury, rather than to the commissioner. In addition, some states may require the tax to be paid on a periodic basis (e.g. annually) rather than at the time of the filing required by Subsection A. Subsections A and B may need to be revised in these states.

C. If an independently procured policy covers properties, risks or exposures only partially located or to be performed in this state, the tax payable shall be computed on the portion of the premium properly attributable to the properties, risks or exposures located or to be performed in this state, as set forth in Sections 5F(3) and 5F(4) of this Act.

D. Delinquent taxes hereunder shall bear interest at the rate of [insert number] percent per year.

E. This section does not abrogate or modify, and shall not be construed or deemed to abrogate or modify any other provision of this Act.

[. . . .]

Legislative History (all references are to the Proceedings of the NAIC).

1994 Proc. 3rd Quarter 14, 16-17, 24, 28-46 (adopted).

1996 Proc. 3rd Quarter 9, 42, 1110, 1168, 1169-1173, 1189-1190 (amended).

1997 Proc. 4th Quarter 25, 27-28, 1004, 1029 (amended).

1999 Proc. 3rd Quarter (amended).

This model draws from and replaces three earlier NAIC models:

Model Surplus Lines Law

1983 Proc. I 6, 36, 834, 900, 913-922 (adopted).

1985 Proc. II 11, 24, 702, 722, 723-724 (amended).

1986 Proc. I 9-10, 24, 799, 813, 814-821 (amended).

1990 Proc. I 6, 30, 840-841, 897-898, 900-901 (amended).

1991 Proc. I 9, 18, 908, 949, 950, 952-961 (amended and reprinted).

Unauthorized Insurers Model Act

1969 Proc. I 168, 218, 222-227, 271 (adopted).

1978 Proc. I 13, 15, 348, 350 (amended).

1990 Proc. II 7, 13-14, 159-160, 187-191 (amended and reprinted).

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Model Nonadmitted Insurance Act

1983 Proc. 1 6, 36, 834, 899-900, 923-926 (adopted).

ALLOCATION OF SURPLUS LINES AND INDEPENDENTLY PROCURED INSURANCE PREMIUM TAX ON MULTI-STATE RISKS MODEL REGULATION

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Section 1. Purpose

The purpose of this regulation is to:

A. Implement the provisions of Section [insert citation to state law equivalent to Section 5 of the Nonadmitted Insurance Model Act] by requiring surplus lines licensees to allocate premiums where a placement of surplus lines insurance covers properties, risks or exposures located or to be performed in various states (multi-state risks);

B. Facilitate payment of surplus lines tax or independently procured insurance tax in this state pursuant to [cite state law equivalent to Section 6 of the Nonadmitted Insurance Model Act]; and

C. Provide a mechanism by which a surplus lines licensee or insured shall allocate premiums and pay premium taxes to each state where placement of surplus lines insurance covers properties, risks or exposures located or to be performed in each state.

Section 2. Allocation of Premium Tax on Multi-State Risks

A. In determining the amount of premiums taxable in this state, all premiums written, procured or received in this state shall be presumed to be written on properties, risks or exposures located or to be performed in this state, except

(1) For a reciprocal state, premiums that are allocated or apportioned as taxable premiums of the reciprocal state in accordance with the provisions of this regulation, but the tax payable to this state shall not be less than the tax due pursuant to this regulation. However, if the amount of tax due under this provision is less than $50 in any jurisdiction, it shall be payable in the jurisdiction in which the affidavit is required to be filed; or

(2) For a nonreciprocal state, premiums that are allocated or apportioned as taxable premiums of the nonreciprocal state and the taxes have been paid to the nonreciprocal state.

B. On an insurance policy covering properties, risks or exposures located or to be performed in various states, the tax to be paid to the commissioner of each state shall be computed on that portion of the policy premium that is attributable to properties, risks or exposures located or to be performed in each state.

C. The surplus lines licensee or the insured who has independently procured insurance shall determine the taxable portion of the premium by using one of the following methods:

(1) Allocate premium on the same basis or bases used to establish the policy premium; or

(2) Allocate premium as prescribed in the allocation schedule in Appendix A of this regulation that pertains to the classification describing the coverage, subject to the following:

(a) If the allocation schedule does not identify a classification appropriate to the properties, risks or exposures being insured, the surplus lines licensee or the insured who has independently procured insurance shall use an alternative equitable method of allocation; and

(b) If a policy covers more than one classification:

(i) For any portion of the coverage identified by a classification on the allocation schedule, the tax shall be computed by using the allocation schedule for the corresponding portion of the premium;

(ii) For any portion of the coverage not identified by a classification on the allocation schedule, the tax shall be computed in accordance with Subparagraph (a) of this paragraph; and

(iii) For any portion of the coverage where the premium is indivisible, the tax shall be computed by using the method of allocation that pertains to the classification describing the predominant coverage.

D. If the information provided by the surplus lines licensee or the insured who has independently procured insurance is insufficient to substantiate its method of allocation, or if the commissioner determines that its method is incorrect, the commissioner shall determine the equitable and appropriate amount of tax due to this state, as follows:

(1) If the allocation schedule identifies a classification appropriate to the coverage, the commissioner shall use the method prescribed in Subsection C.

(2) If the Allocation Schedule does not identify a classification appropriate to the coverage, the commissioner, in determining the equitable and appropriate amount of tax due to the state, shall give significant weight to documented evidence of the underwriting bases and other criteria used by the insurer. The commissioner may also consider other available information, to the extent sufficient and relevant, such as the percentage of the insured's physical assets in this state, the percentage of the insured's employee payroll in this state, the percentage of the insured's sales in this state and the amount of premium tax paid to another jurisdiction for the policy.

Drafting Note: In some states, determination of, and payment of, tax is the responsibility of a state official other than the commissioner. Subsection D should be modified as necessary to reflect state law.

Section 3. Reporting and Remittance of Tax

A. Each licensee or insured who has independently procured insurance shall file a tax allocation report, as specified in Appendix B of this regulation. The filing of a tax allocation report and the remittance of tax may be made by a person authorized by the insured to act as its agent.

B. The commissioner shall at least annually furnish to the commissioner of a reciprocal state a copy of all filings reporting an allocation of taxes required by this section.

C. The preparation and submission of tax allocation reports and the payment of independently procured insurance taxes by a surplus lines licensee of another state to the commissioner of this state either directly or indirectly for lawful transactions taking place outside this state shall not be considered the placement of insurance in this state by the surplus lines licensee.

APPENDIX A

SURPLUS LINES PREMIUM TAX ALLOCATION SCHEDULE

Criteria for Tax Allocation of Multi-State Risks

CODE	CLASSIFICATION	ALLOCATE TO STATE BY
PROPERTY INSURANCE:		
01	Real Property (including buildings and other permanent additions)	Insured value of structures and other property in state
02	Personal Property (including inland marine)	Insured value of property permanently or principally situated in state
03	Business Interruption, Time Element, or similar time value coverages	Insured time valued elements in state
04	Farmowners, Homeowners, and Businessowners (BOP)	Insured value of structures and other property in state
05	Aircraft	Insured value of aircraft principally hangared or principally used in state
06	Motor Vehicle	Insured value of motor vehicles principally garaged or principally used in state

07	Kidnap & Ransom	Number of insured employees principally employed in state
08	Ocean Marine	None to state

FIDELITY AND SURETY:

11	Fidelity, Forgery, and other Indemnity Bonds	Number of insured employees in state
12	Bankers' Blanket Bonds	Number of insured employees in state
13	Performance Bonds	Total bond value of contracts in state
14	Other surety Bonds	Total bond value of contracts in state

CREDIT INSURANCE:

21	Credit Insurance	Value of insured debt in state

RESIDUAL VALUE INSURANCE:

31	Residual Value Insurance	Allocate to value of underlying property

LIABILITY INSURANCE:

41	Manufacturers and Contractors	Payroll in state
42	Premises Operations	Square footage of premises in state
43	Owners and Contractors Protective	Cost of contract in state

44	Products	Receipts in state
45	Completed Operations	Receipts in state
46	Municipalities, Public Authorities and other Political Subdivisions	Number of municipalities, etc. in state
47	Child Care	Number of children in state
48	Contractual	If "stand alone" policy, value of sales in state
49	Recreational	Amount of gate receipts in state
50	Environmental Impairment	Number of units of exposure in state
51	Asbestos Abatement	Payroll in state
52	Employee/Member Benefit Program	Number of employees/ members in state
53	Special Events	Receipts from state
54	Professional Liability	Number of insureds in state
55	Errors and Omissions	Revenues generated in state
56-A	For-Profit Organization	Revenues generated in state
56-B	Not-for-Profit Organization	Number of directors and officers based in state
57	Hospital, Nursing Home, and Adult Home	Number of beds in facility plus one additional bed for each 100 outpatient visits at locations in state

58	Liquor Liability	Receipts from sales of alcoholic beverages in state
59	Railroad Protective	Miles of track in state
60	Aircraft	Number of aircraft principally hangared or principally used in state
61	Motor Vehicle	Number of motor vehicles principally garaged or principally used in state
62	Umbrella	Classification of predominant coverage; except if underlying coverages are divisible, then use underlying classifications
63	Excess Liability	If directly over primary, use underlying classifications. If over umbrella, use method in Code 62.

APPENDIX B

TAX ALLOCATION REPORT

AFFIDAVIT

#_____

1. NAME AND LICENSE NO. OF SURPLUS LINES PRODUCER

_____ _____

2. NAMES, ADDRESSES, TELEPHONE NOS., AND NAIC NOS. OF INSURERS

_____

_____

_____

3. NAME OF INSURED AND POLICY NUMBER

_____ _____

_____ _____

If purchasing group or an authorized group, list (a) name of group; (b) names of individual members for whom the allocation is being made; and (c) the policy numbers (group and individual) and certificate numbers, as applicable.

4. TOTAL GROSS POLICY PREMIUM

(PG. 2 ITEM 8, COL. 5 TOTAL) $_____

5. PREMIUM ALLOCATED TO (insert state)

_____ $_____

(PG. 2 ITEM 8, COL. 6 TOTAL)

6. AMOUNT OF PREMIUM TAX DUE TO (state)

_____ $_____

(PG. 2 ITEM 8, COL. 7 TOTAL)

NOTE: This payment shall be included with your quarterly (or annual) premium tax payment.

7. LIST ALL STATES IN WHICH EXPOSURE EXISTS AND THE CORRESPONDING PREMIUMS AND TAXES ALLOCATED TO EACH STATE (USE A SEPARATE PAGE IF NEEDED).

8. Calculation of Premium Tax Allocation:

1	2	3	4	5	6	7
Classification Codes and Methods of Allocation as indicated in the Allocation Schedule	Total Amount of Exposure	Exposure in (insert state)	% Ratio of Column 3 to Column 2	Total Gross Policy Premium	Premium Allocated to (insert state). Multiply Column 4 by Column 5	Tax Due to (insert state). Multiply Column 6 by _____
TOTALS	XXXXX	XXXXX	XXXXX	$_____	$_____	$_____

Notes:

Column 1:

(a) If policy covers more than one classification, enter each classification code separately.

(b) For any portion of the premium that is not divisible, list all coverages and specify the predominant coverage.

Columns 2 and 3:

(c) Indicate the units, insured values, numbers, etc. upon which the allocation is made. If classification code and method of allocation for all or a portion of the policy is not listed in the Allocation Schedule, attach explanatory memorandum describing the property or risk and supporting the alternative equitable method of allocation used for that portion.

Column 7:

(d) Insert tax rate.

THE FOLLOWING CERTIFICATION MUST BE COMPLETED

The undersigned certifies that the information reported in Items 1 through 8 of this form, including all attached supporting documentation, is true to the best of my knowledge, information and belief under penalties of perjury.

Date	Signature of Licensee or Sublicensee

Legislative History (all references are to the Proceedings of the NAIC).

1995 Proc. 3rd Quarter (adopted).

NONADMITTED INSURANCE MODEL ACT

The date in parentheses is the effective date of the legislation or regulation, with the latest amendments.

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Alabama		ALA. CODE §§ 27-10-1 to 27-10-3 (1963/1971) [2]; §§ 27-10-20 to 27-10-38 (1963/1994) [1]; §§ 27-10-35 to 27-10-36 (1963/1971) [3]
Alaska	ALASKA STAT. §§ 21.34.010 to 21.34.900 (1984/1997) [1]	ALASKA STAT. §§ 21.33.037 to 21.33.065 (1968/1996) [2]
Arizona		ARIZ. REV. STAT. ANN. §§ 20-401 To 20-401.07 (1972/2000) [2]; §§ 20-407 to 20-420 (1954/2000) [1]
Arkansas		ARK. CODE ANN. §§ 23-65-101 To 23-65-104 (1959/2001) [3]; §§ 23-65-301 to 23-65-319 (1959/2001) [1]
California		CAL. INS. CODE §§ 1760 to 1780 (1935/2000) [1]; *See also* CAL. REVENUE AND TAXATION CODE §§ 13201 to 13222 (1993/1994) (Tax).
Colorado	COLO. REV. STAT. §§ 10-3-901 to 10-3-910 (1963/1998) [2]	COLO. REV. STAT. § 10-5-101 To 10-5-117 (1963/1999) (Includes some of model) [1]
Connecticut	CONN. GEN. STAT. §§ 38a-271 to 38a-278 (1970/1979) [2]	CONN. ADMIN. CODE §§ 38a-740-1 to 38a-740-11 (1985/1996) [1]; § 38-271 (1969/1997) [3]
Delaware		DEL. CODE ANN. tit. 18 §§ 1901 to 1919 (1953/1995) [1]
D.C.	NO ACTION TO DATE	
Florida		FLA. STAT. §§ 626.901 to 626.903 (1982/1995) [2]; 626.913 to 626.937 (1959/2001) [1]; §§ 626.938 to 626.939 (1959/2001) [3]

Georgia		GA. CODE ANN. 33-5-20 to 33-5-35 (1960/2000) [1]; § 33-5-33 (1933/1960) [3]
Guam		GUAM GOV'T. CODE §§ 43125 to 43134 [2]; §§ 43260 to 43266 (1966) ("Surplus line broker or agents") [1]
Hawaii	HAWAII REV. STAT. §§ 431:8-201 to 431:8-211 (1988/1989) [2]; §§ 431:8-300 to 431:8-320 (1988/1993) [1]	HAWAII REV. STAT. § 431:8-205 (1987) [3]
Idaho		IDAHO CODE §§ 41-1211 to 41-1232 (1961/1997) [1]; §§ 44-1233 to 41-1234 (1961/1993) [3]
Illinois	215 ILL. COMP. STATS. 5/121 to 5/121-19 (1977/1998) [2]	215 ILL. COMP. STATS. 5/445 to 5/445.1 (1980/1999) [1]
Indiana	IND. CODE §§ 27-4-5-1 to 27-4-5-8 (1969/1995) [2]	
Iowa	IOWA CODE §§ 507A.1 to 507A.11 (1967/1998) [2]	*See* IOWA ADMIN. CODE §§ 191-21.1 to 191-21.6 plus forms (1963/1999) [1]
Kansas	KAN. STAT. ANN. §§ 40-2701 to 40-2709 (1969/1992) [2]	KAN. STAT. ANN. §§ 40-246 to 40-246e (1982/1999) [1]
Kentucky	KY. REV. STAT. §§ 304.11-010 to 304.11-050 (1970/1982) [2]	KY. REV. STAT. §§ 304.10-010 To 304.10-210 (1970/2000) [1]
Louisiana	LA. REV. STAT. ANN. §§ 22:1248 to 22:1256 (1958/1999) [4] (Most of Sections 1-5 of current model).	LA. REV. STAT. ANN. §§ 22:1257 to 22:1270 (1958/1999) [1]
Maine		ME. REV. STAT. ANN. tit. 24-A §§ 2001 to 2019 (1970/1997) [1]; § 2113 (1969/1973) [3]
Maryland	MD. ANN. CODE Ins. §§ 4-201 to 4-212 (1968/1997) [2]	MD. ANN. CODE Ins. §§ 3-301 to 3-327 (1963/1999) [1]
Massachusetts	NO ACTION TO DATE	
Michigan		MICH. COMP. LAWS §§ 500.1901 To 500.1955 (1981/1996) [1,3]
Minnesota	MINN. STAT. §§ 72A.40 to 72A.44 (1967/1994) [2]	MINN. STAT. §§ 60A.195 to 60A.209 (1981/2000) [1]
Mississippi	NO ACTION TO DATE	

Missouri	MO. REV. STAT. §§ 375.786 to 375.790 (1972/1998) [2]; §§ 384.011 to 384.071 (1987/1994) [1]	*See also* MO. ADMIN. CODE Tit. 20 §§ 200-6.100 to 200-6.400 (1987/1999) (Includes allocation formula) [1]
Montana	MONT. CODE ANN. §§ 33-2-301 to 33-2-708 (1959/1999) [1]	MONT. CODE ANN. § 33-2-706 (1959/1989) [3]
Nebraska	NEB. REV. STAT. §§ 44-2001 to 44-2008 (1969/1995) [2]	NEB. REV. STAT. §§ 44-5501 to 44-5514 (1992/1999) [1]
Nevada	NEV. REV. STAT. §§ 685B.020 to 685B.080 (1997) [2]	NEV. REV. STAT. §§ 685A.010 To 685A.220 (1971/1999) [1]
New Hampshire	N.H. REV. STAT. ANN. §§ 406B:1 to 406B:15 (1967/1991) [2]	
New Jersey		N.J. REV. STAT. §§ 17:22-6.40 To 17:226.69 (1960/1996) [1,3]
New Mexico	N.M. STAT. ANN. §§ 59A-15-1 to 59A-15-10 (1985) [2]	N.M. STAT. ANN. §§ 59A-14-1 To 59A-14-18 (1985/1999) [1]
New York		N.Y. ADMIN. CODE tit. 11 §§ 27.0 to 27.23 (1994/1999) (Regulation 41) [1]; *See also* N.Y. INS. LAW §§ 2117 To 2118 (1984/2000).
North Carolina	N.C. GEN. STAT. §§ 58-21-1 to 58-21-105 (1985/1999) [1]; §§ 58-28-1 to 58-28-40 (1967/1985) [2]	
North Dakota	N.D. CENT. CODE §§ 26.1-02-05 to 26.1-02-19 (1983/1999) [2]	N.D. CENT. CODE §§ 26.1-44-01 To 26.1-44-09 (1985) [1]
Ohio	OHIO REV. CODE ANN. §§ 3901.17 to 3901.18 (1955-1956/1997) [2]	
Oklahoma		OKLA. STAT. tit. 36 §§ 1101 To 1120 (1957/1999) [1,2]
Oregon	OR. REV. STAT. §§ 735.400 to 735.495 (1987/1995) [1]; §§ 746.310 to 746.370 (1967/1995) [2]	
Pennsylvania		PA. UNCONS. STAT. §§ 40-15-101 to 40-15-125 (1992/1994) [1]

Puerto Rico		P.R. LAWS ANN. tit. 26 §§ 1001 To 1006 (1977) [2]; §§ 1007 to 1018 (1961/1980) [1]
Rhode Island	R.I. GEN. LAWS §§ 27-16-1.1 to 27-16-2.4 (1973/1999) [2]	R.I. GEN. LAWS §§ 27-3-38 To 27-3-42 (1959/2000) [1]
South Carolina	S.C. CODE ANN. §§ 38-25-10 to 38-25-570 (1988/1998) [2]	
South Dakota	S.D. CODIFIED LAWS ANN. §§ 58-8-1 to 58-8-5 (1966/1978) [2]	S.D. CODIFIED LAWS ANN. §§ 58-32-1 to 58-32-58 (1966/2000) [1,3]
Tennessee	TENN. CODE ANN. §§ 56-2-601 to 56-2-704 (1955/1971) [2]	TENN. CODE ANN. §§ 56-14-101 To 56-14-117 (1969/1985) [1]
Texas	TEX. INS. CODE ANN. Sec. 101.001 to 101.301 (1967/1999) [2]	TEX. INS. CODE ANN. art. 1.14-2 (1967/1999) [1]
Utah	UTAH CODE ANN. §§ 31A-15-101 to 31A-15-102; 31A-2-309 to 31A-2-311 (1985/1995) [2]	UTAH CODE ANN. §§ 31A-15-103 To 31A-15-110 (1986/1999) [1]
Vermont		VT. STAT. ANN. tit. 8 §§ 3368 To 3370 (1968/1996) [2]; §§ 5021 to 5040 (1979/1996) [1,3]
Virgin Islands		V.I. CODE ANN. tit. 22 §§ 651 To 652 (1968/1987) [2]; §§ 653 to 667 (1968/1999) [1]
Virginia	VA. CODE §§ 38.2-4800 to 38.2-4815 (1986/1999) [1]	
Washington		WASH. REV. CODE ANN. §§ 48.15.020 to 48.15.030 (1947/1992) [2]; §§ 48.15.040 to 48.15.170 (1947/1997) [1]
West Virginia	W.VA. CODE §§ 33-3-18 to 33-3-32 (1992) [2]	W. VA. CODE §§ 33-12-10 to 33-12-25 (1957/1999) [1]
Wisconsin		WIS. STAT. § 618.41 (1971/1990) [1]; §§ 618.39, 618.47 to 618.61 (1971/1996) [2]
Wyoming		WYO. STAT. §§ 26-11-101 to 26-11-122 (1983/1991) [1]; §§ 26-12-102 to 26-12-103 (1967/1983) [2]

KEY

[1] Based on prior NAIC Model Surplus Lines Law found at 1991 Proc. I Page 952-961 (model column) or other regulation of surplus lines.

[2] Based on prior NAIC Unauthorized Insurers Model Statute found at 1990 Proc. II Page 187-191 (model column) or other regulation of unauthorized insurers.

[3] Based on prior NAIC Model Nonadmitted Insurance Act found at 1983 Proc. I Pages 923-926 (model column) or other regulation of nonadmitted insurers.

[4] Based on current Nonadmitted Insurance Model Act.

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ALLOCATION OF SURPLUS LINES AND INDEPENDENTLY PROCURED INSURANCE PREMIUM TAX ON MULTI-STATE RISKS MODEL REGULATION

The date in parentheses is the effective date of the legislation or regulation, with the latest amendments.

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Alabama		ALA. CODE § 27-10-31 (1993).
Alaska		ALASKA STAT. §§ 21.33.055, 21.33.061 (1992/1996).
Arizona		ARIZ. REV. STAT. ANN. § 20-401.07 (1974/2000); § 20-416 (1981/1997); ARIZ. ADMIN. COMP. R20-6-207 (1974).
Arkansas		ARK. CODE ANN. § 23-65-315 (1987).
California		CAL. INS. CODE § 1775.5 (1994).
Colorado		COLO. REV. STAT. § 10-3-909; § 10-5-111 (1992).
Connecticut		CONN. GEN. STAT. § 38a-277 (1969/1997).
Delaware		DEL. CODE ANN. tit. 18 § 1917 (1988/1995).
District of Columbia	NO ACTION TO DATE	
Florida		FLA. STAT. § 626.932 (1992/1997).
Georgia		GA. CODE ANN. § 33-5-31 (1995).
Guam	NO ACTION TO DATE	
Hawaii		HAWAII REV. STAT. § 431:8-315 (1987).
Idaho		IDAHO CODE §§ 41-1229, 41-1233 (1987/1993).
Illinois	NO ACTION TO DATE	
Indiana	NO ACTION TO DATE	

Iowa	NO ACTION TO DATE	
Kansas	NO ACTION TO DATE	
Kentucky		KY. REV. STAT. § 304.10-180 (1982/2000); § 304.11-050 (1992/2000).
Louisiana		LA. REV. STAT. ANN. § 22:1265 (1984/1999); § 22:1269 (1970/1999).
Maine		ME. REV. STAT. ANN. tit. 24-A § 2016 (1991/1997).
Maryland		MD. ANN. CODE INS. § 3-324 (1983/1997); §§ 4-209 to 4-211 (1993/1997).
Massachusetts	NO ACTION TO DATE	
Michigan	NO ACTION TO DATE	
Minnesota		MINN. STAT. § 60A.198 (1981/2000); § 60A.209 (1987/2000).
Mississippi	NO ACTION TO DATE	
Missouri		MO. REV. STAT. §§ 384.051, 384.061 (1987/1989); MO. ADMIN. CODE § 200-6.400 (1992).
Montana		MONT. CODE ANN. §§ 33-2-311, 33-2-706 (1989).
Nebraska	NO ACTION TO DATE	
Nevada	NEV. ADMIN. CODE § 685A.420 (1996) (Table from model).	
New Hampshire		N.H. REV. STAT. ANN. §§ 406-B:11 to 406-B:12 (1971).
New Jersey	N.J. ADMIN. CODE §§ 11:2-34.1 to 11:2-34.6(1993/2001).	N.J. REV. STAT. §17:22-6.59 (1960/1996).
New Mexico		N.M. STAT. ANN. § 59A-14-12 (1984/1999).
New York	N.Y. ADMIN. CODE tit. 11 §§ 27.4 to 27.8 (1993/1999) (Reg. 41).	N.Y. INS. LAW § 9102 (1984/1991).

North Carolina	NO ACTION TO DATE	
North Dakota		N.D. CENT. CODE § 26.1-44-06 (1985).
Ohio	NO ACTION TO DATE	
Oklahoma		OKLA. STAT. tit. 36 § 1115 (1991/1999).
Oregon	NO ACTION TO DATE	
Pennsylvania		PA. UNCONS. STAT. §§ 40-15-121 to 40-15-122 (1992).
Puerto Rico	NO ACTION TO DATE	
Rhode Island	NO ACTION TO DATE	
South Carolina	NO ACTION TO DATE	
South Dakota		S.D. CODIFIED LAWS ANN. §§ 58-32-45 to 58-32-47 (1966/1978).
Tennessee		TENN. CODE. ANN. § 56-14-113 (1985).
Texas		TEX. INS. CODE ANN. art. 1.14-1 to 1.14-2 (1995/1999).
Utah		UTAH CODE ANN. § 31A-3-303 (1985/1992).
Vermont		VT. STAT. ANN. tit. 8 § 5036 (1979).
Virgin Islands		V.I. CODE ANN. tit. 22 § 662 (1968/1999).
Virginia	NO ACTION TO DATE	
Washington		WASH. REV. CODE ANN. § 48.15.120 (1947).
West Virginia	NO ACTION TO DATE	
Wisconsin		WIS. STAT. § 618.43 (1971/1988).
Wyoming		WYO. STAT. § 26-11-118 (1967/1983).

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Summary of State Laws — Allocation Vs. Full Premium Tax – updated after state survey 6/5/01 A = Allocation State F = Full Premium	
STATE	**Allocation/Full**
Alabama	A
Alaska	A
Arizona	A
Arkansas	A
California	A
Colorado	A
Connecticut	A
Delaware	A
District of Columbia	F
Florida	A
Georgia	A
Hawaii	A
Idaho	A
Illinois	Partial Allocation (Property Only)
Indiana	F
Iowa	A
Kansas	A
Kentucky	A
Louisiana	A
Maine	A
Maryland	F
Michigan	F
Minnesota	A
Mississippi	A
Missouri	A

Montana	A
Nebraska	Allocation in practice
Nevada	A
New Hampshire	A
New Jersey	A
New Mexico	A
New York	A
North Carolina	A
North Dakota	A
Ohio	A
Oklahoma	A
Oregon	F (Allocation as matter of practice.)
Pennsylvania	A
Puerto Rico	A (Taxes out of state brokers on risk, or residents, located or to be performed in Puerto Rico wherever it was negotiated.)
Rhode Island	F
South Carolina	F (Allocation as a matter of practice)
South Dakota	A
Tennessee	A
Texas	A
Utah	A
Vermont	A
Virginia	A
Virgin Islands	A
Washington	A
West Virginia	A

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